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MICHAEL RODAK, JR., CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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## No. 72-645

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JOSEPH BRIOLA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APEALS FOR THE TENTH CIRCUIT

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FLYNN KIMERER THINNES & GALBRAITH

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Attorneys for Petitioner

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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## No.

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JOSEPH BRIOLA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APEALS FOR THE TENTH CIRCUIT

---

Petitioner Joseph Briola prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming the judgment of conviction rendered by the United States District Court for the District of Colorado.

### Opinion Below

The opinion of the Court of Appeals, not yet officially reported, is printed in the Appendix.

## Jurisdiction

The judgment of the Court of Appeals was entered on September 7, 1972. A timely Petition for Rehearing was denied on September 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Questions Presented

1. Whether it was a misapplication of 18 U.S.C. § 894 to apply it to a transaction where physical harm or the threat of harm occurred before an extension of credit ever existed?

2. Whether the court erred in ruling that one is criminally responsible for the unaided and unconsented to criminal acts of one's partner?

## Statutes Involved

*18 U.S.C. § 891(1):*

"To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred."

*18 U.S.C. § 891(3):*

"The term 'debtor', with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the faliure of any person to whom that extension of credit is made to repay the same."

*18 U.S.C. § 891(7):*

"An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person."

*18 U.S.C. § 894(a):*

"Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both."

## Statement

After a trial by jury in the United States District Court for the District of Colorado, petitioner was convicted of attempting to collect an extension of credit by extortionate means as defined in 18 U.S.C. § 894(a). He was sentenced to imprisonment for a period of eight years.

In the fall of 1970 the petitioner, together with James R. Clapes and Anthony Ligrani, was engaged in a bookmaking operation. Petitioner owned 50 percent of the enterprise and Clapes and Ligrani 25 percent each. In October 1970, Donald Meyer was hired by the partnership to work as a phone man. His duty was to receive bets from customers over the phone and to relay this information to the partners.

In November 1970 Meyer placed a series of bets on his own account and lost $900. He had placed these bets in the name of Wynn Don, who was an acquaintance of Meyer at Park Hill Golf Club. According to Meyer, he had taken a bet from Wynn Don on one occasion. Following this November incident, Meyer advised Briola and Clapes that he had personally made the bets that were charged to Wynn Don. Briola told Meyer that "everybody can make a mistake but don't make any more." Thereafter, Meyer repaid this loss to the partnership.

During the New Year's football games of January 1, 1971, Meyer once again used the name of Wynn Don in placing a number of bets. He lost approximately $10,000. Soon after the games Briola called Meyer to discuss the Wynn Don loss. Being uncertain as to what to do about this, Meyer called Clapes and told him that Wynn Don had left town and would not pay. Clapes in turn advised Briola, and thereafter the three partners

set up a meeting at Briola's apartment with Meyer to discuss collecting the debt from Wynn Don.

At the meeting, Meyer had been drinking and appeared to be indifferent about the $10,000 loss. According to the testimony of Meyer, Briola grabbed Meyer and slapped him several times. Meyer agreed to try to get the money from his mother and stepfather, and he was questioned closely as to their identity and financial abilities. After agreeing to get the money, Meyer said that Wynn Don would return to town later and he would get reimbursed from him. At that point Clapes began to beat Meyer, but Briola pulled Clapes away from Meyer.

The Court of Appeals held that 18 U.S.C. § 894(a) applied to the facts of this case, where no extension of credit had even been made or discussed at the time that the petitioner slapped Don Meyer.

## Reasons For Granting The Writ

The present case involves an important question of federal law which has not been, but should be, settled by this Court. The petitioner, therefore, turns to a consideration of the questions presented.

I. *It Was A Misapplication Of 18 U.S.C. § 894 To Apply It To A Transaction Where Physical Harm Or The Threat of Harm Occurred Before An Extension Of Credit Ever Existed.*

The Court of Appeals concedes that there was never an extension of credit made by Briola to Donald Meyer until after Meyer was slapped by Briola. The court reasons that the extension of credit occurred when Meyer agreed to be responsible for the debt of Wynn Don. However, this "extension of credit" occurred after Meyer was struck by Briola. Therefore, it would have been impossible for Briola to have used extortionate means to collect an extension of credit that had not yet occurred.

Section 894(a)(1) makes it a crime to "collect or attempt to collect any extension of credit" by extortionate means. Here

there may have been the *creation* of an extension of credit by extortionate means, but there is absolutely no evidence to indicate that Briola attempted to use extortionate means to *collect* an extension of credit. It is the latter act rather than the former which is a crime under § 894.

After Meyer agreed to be responsible for the debt of Wynn Don, Briola was not involved in any conduct which could be viewed as an extortionate means to collect an extension of credit. Briola, in fact, actually protected Meyer from Clapes.

Of all the cases involving § 894, not one considers a fact situation where threats of violence occurred before an extension of credit was ever made. *United States v. Palmieri,* 456 F.2d 9 (2nd Cir. 1972); *United States v. DeStafano,* 429 F.2d 344 (2nd Cir. 1970); *United States v. Biancofiori,* 422 F.2d 584 (7th Cir. 1970), *cert, denied,* 398 U.S. 942, 90 S.Ct. 1857 (1970); *United States v. DeLutro,* 435 F.2d 255 (2nd Cir. 1970); *Perez v. United States,* 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971); *United States v. Quintana,* 457 F.2d 874 (71-1585, Advance Sheet of March 31, 1972) (10th Cir. 1972); *United States v. Curcio,* 310 F.Supp. 351 (D.C. Conn. 1970); *United States v. Tomasetta,* 429 F.2d 978 (1st Cir. 1970); *United States v. Manarite,* 434 F.2d 1069 (2nd Cir. 1970); *United States v. Cafaro,* 455 F.2d 323 (2nd Cir. 1972); and *United States v. Keresty,* 334 F. Supp. 461 (W.D. Pa. 1971).

The Court of Appeals relies in large part on the theory of "contemporaneousness." The court urges that the entire situation was so compacted in time that everything was contemporaneous with everything else, and it did not make any difference what happened when. Such reasoning is frightening, for it totally guts the concept that for a crime to be perpetrated there are specific elements that must occur in a certain sequence. The record here is clear as to what the sequence of events was. And when viewed in light of § 894, there was no crime by Briola, since he did not attempt to collect an extension of credit by extortionate means.

II. *The Court Erred In Ruling That One Is Criminally Responsible For The Unaided And Unconsented To Criminal Acts Of One's Partner.*

Since the record is clear that Briola committed no acts which can be viewed as extortion after Meyer agreed to be responsible for the Wynn Don debt, the majority opinion is forced to reason that the allegedly extortionate acts of Clapes can be imputed to Briola, since Clapes and Briola were partners.

Existing case law is clear that one is not liable for the criminal acts of his partner. *United States v. Quinn,* 141 F.Supp. 622 (D.C. N.Y. 1956); *United States v. Ward,* 168 F.2d 226 (3rd Cir. 1948). Yet, this is the result of the reasoning of the Court of Appeals. It cannot even be seriously urged that Briola abetted his partner's crime, since it was Briola who stopped Clapes from abusing Meyer.

Additionally, in its reasoning the Court of Appeals failed to consider the indictment, which specifically accused Briola of causing physical harm to Meyer. The majority opinion concedes that Briola did not cause any physical harm to Meyer after the extension of credit had been made. Thus, Briola cannot be held criminally responsible when the proof does not conform to the charge in the indictment.

## Conclusion

For the foregoing reasons, the writ should issue.

Respectfully submitted,

FLYNN KIMERER THINNES & GALBRAITH

By John J. Flynn
Michael D. Kimerer
Richard L. Parrish

Attorneys for Petitioner

October, 1972

# APPENDIX

## UNITED STATES COURT OF APPEALS

## TENTH CIRCUIT

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JULY TERM, 1972

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| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>JOSEPH BRIOLA,<br>Defendant-Appellant. | Nos. 71-1615 and 72-1246 |

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(Criminal No. 71-CR-66)

Submitted on the briefs.

James L. Treece, United States Attorney, and Richard J. Speltz, Assistant United States Attorney, for Plaintiff-Appellee.

John J. Flynn and Michael D. Kimerer of Flynn, Kimerer, Thinnes & Galbraith for Defendant-Appellant.

Before LEWIS, Chief Judge, KILKENNY* and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

In this case the defendant-appellant, Joseph Briola, was charged with having knowingly and wilfully used extortionate

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*Of the Ninth Circuit sitting by designation.

means, contrary to § 891(7) of Title 18, United States Code[1], in attempting to collect from one Donald Meyer, an extension of credit. The indictment further charged that the defendant, together with one James R. Clapes, who was not named as a defendant, caused harm to the person of said Donald Meyer, in violation of Title 18 U.S.C. § 894.[2]

Appellant Briola challenges the sufficiency of the evidence to establish that there existed an extension of credit within the meaning of the statute. He here contends that in the dearth of such evidence even the use of force does not fulfill the statutory requirements.[3] Our inquiry will then be addressed mainly to this element, namely, adequacy of the evidence in support of the allegation that the defendant was engaged in attempting to collect an extension of credit.

In the fall of 1970 the defendant, together with one James R. Clapes and Anthony Ligrani, were engaged in a bookmaking operation. Defendant-appellant owned 50 percent of the enter-

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1. Which provides as follows:

> (7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

2. Subsection (a) thereof provides as follows:

> (a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> (1) to collect or attempt to collect any extension of credit, or
>
> (2) to punish any person for the nonrepayment thereof,
>
> shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

3. Counsel for Briola argue:

> • • • Briola never knowingly extended credit to Donald Meyer. Meyer misappropriated money from Briola by placing bets on his own behalf under the code name of "Don Wynn." To call this act an extension of credit would make § 894 an absurdity, since any employer who harms an employee because he discovered the employee had been stealing from him, would be guilty of a violation of § 894. This is clearly not the statute's purpose. See *Perez v. United States*, 40 U.S. 146, 91 S.Ct. 1357, .... L.Ed2d .... (1971).

prise and Clapes and Ligrani 25 percent each. In October 1970, Donaly Meyer was hired by the partnership to work as phone man. His duty was to receive bets from customers over the phone and to relay this information to the partners. The evidence showed that Meyer had some of his own customers for whom he would pay and collect money as well as relay information to Briola, but as to most of his contacts he would merely receive the bets and relay the information. All of these bets were handled on a credit basis.

In November Meyer placed a series of bets on his own account and lost $900.00. He had placed these bets in the name of Wynn Don, who was said to have been a real person and an acquaintance of Meyer at Park Hill Golf Club. According to Meyer he had taken a bet from him on one occasion. Following this November incident, Meyer advised Briola and Clapes that he had personally made the bets that were charged to Wynn Don. He was told by Briola that "everybody can make a mistake but don't make any more." Thereafter, Meyer repaid this loss to the partnership.

He did not repeat this practice until the New Year's football games of January 1, 1971, but here again he used the name of Wynn Don in placing a number of bets. He lost approximately $10,000.00. Soon after the games Briola called Meyer to discuss the Wynn Don loss. Being uncertain as to what to do about this, Meyer called Clapes and told him that Wynn Don had left town and would not pay. Clapes in turn advised Briola, and thereafter the three partners set up a meeting at Briola's apartment with Meyer. This meeting lasted about an hour and a half.

Clapes testified that before the meeting the thought passed his mind that Meyer had placed the bet on his own behalf, and he further testified that Meyer was asked if any of the bet was his. At first, Meyer maintained that the bettor was really Wynn Don and the discussion was as to how to locate him. Meyer testified on direct that he agreed to repay the money since he was responsible for it. Thereafter, according to further testimony of Meyer,

Briola grabbed him and slapped him several times. The upshot of it was that Meyer agreed to try to get the money from his mother and stepfather, and he was questioned closely as to their identity and financial abilities. After agreeing to get the money he said that Wynn Don would return to town later and he could get reimbursed from him. At that point Clapes administered a second beating. The sum total result was that Meyer was severely beaten as evidenced by black eyes, loose teeth and other outward indications. He also said that he was kneed in the groin. Arrangements were made for payment of the money the next day.

Defendant contends, as indicated above, that if anything the witness Meyer was being punished for stealing from his employer and that this particular incident was not within the proper scope of the statute in question since there was not the kind of extension of credit that was there contemplated.

It is undoubtedly true that this statute was primarily aimed at what is commonly called loansharking, but it is not limited in its terms to a loan in the sense of money passing. See Perez v. United States, 402 U.S. 146, 91 S.Ct. 1357 (1971). From our reading of *Perez* we are convinced that the real thrust of the legislation is directed to the use of extortionate means in order to collect monies which the creditors maintain are owing to them, regardless of whether the loan arose from a traditional type of loan or resulted from the assumption of responsibility as a result of force or threats. The relationship of the use of extortionate means of collecting extension of credit to bookmaking and similar activities was specificially noted in *Perez*. The indebtedness which is now before us is within the Act's ambit.

The term "to extend credit" is broadly defined by the statute (18 U.S.C. § 891(1)) as follows:

> (1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

Thus, the definition embraces a debt which has come into being under circumstances like the instant ones.

Subsection (3) provides:

> (3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

In the case at bar there is no insufficiency of evidence in the record to establish that the witness Meyer accepted responsibility for the payment of the debt prior to or contemporaneously with the use of force to collect it. The record also shows that Meyer was indeed the debtor from the inception of the debt and that Wynn Don was fictitious in this transaction at least, and hence the jury could very well have believed that the partners knew this from the previous incident. Also, since Wynn Don was Meyer's customer he was responsible for payment of the loss. Thus, there existed a basic debt involving an extension of credit within the meaning of the statute.

The defendant-appellant seeks to avoid responsibility by questioning the time sequence of the creation of the debt and the beating. He would have criminal responsibility turn on whether the beating was administered immediately before or immediately after the creation of the promise to pay. This analysis must fail, first, because the evidence, as previously noted, is sufficient to support a finding that the debt arose prior to the first beating. Apart from that, we are impressed that the series of events constituted a single transaction within which the acknowledgment of the debt and the extortionate means were substantially contemporaneous. That, to our way of thinking, is sufficient. As noted, the essence of the offense is the use of force or threats for the purpose of extorting money. If the crime is made to turn on specific sequence, it introduces an artificial standard which robs the definition

of the offense of its substantiality. The meeting in question was for the purpose of collecting the $10,000.00 and there were no noticeable formalities. Certainly, the defendant and Clapes were not concerned with having a legally enforceable contract.

Finally, the evidence is sufficient to establish that Clapes and Briola were partners. Consequently, Briola cannot escape responsibility for the beating which was inflicted by his partner Clapes in his presence since he was shown to have been standing by lending support to the activity of Clapes. Compare United States v. Quintana, 457 F.2d 874 (1972). See also United States v. Keresty, 334 F. Supp. 461 (W.D. Pa. 1971).

The final point urged by Briola is alleged error arising from the refusal of the court to grant a new trial as a result of the efforts of Meyer to recant or relent his trial testimony. A conclusory affidavit of Meyer was attached to Briola's motion for a new trial in which Meyer stated that he had testified falsely at the trial.

We recognize that a new trial should be granted where the court is convinced that a witness has committed perjury at the trial. In this case, however, the trial court, after hearing all of the evidence, including that of the defense attorneys at trial of Briola, found that both the affidavit and the testimony on motion for new trial were false. The court also noted that elements of the so-called Larrison rule derived from Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928) were not satisfied. It is not contended, and indeed it could not be, that the trial court failed to carefully consider Meyer's subsequent testimony, both written and oral. We do not have the slightest doubt as to the accuracy of the trial court's evaluation.

Finding no error in the case, the judgment is affirmed.

UNITED STATES v. BRIOLA, NOS. 71-1615 and 72-1246.

KILKENNY, Dissenting,

The indictment charges appellant with collecting an extension

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of credit by extortionate means in violation of 18 U.S.C. §§ 891 (7) and 894.

On the record before us, there could be an extension of credit to Meyer under two theories and two theories only: (1) that appellant knew that Meyer was placing bets under the name of "Wynn Don", or (2) that Meyer personally assumed the debt, after the alleged assault, by offering to obtain the money from his parents.

(1) It is clear that "Wynn Don" was an actual person who had placed at least one bet under his own name. The name seemed to attract Meyer and in November he used it for his personal betting and after losing a substantial sum, admitted his wrongdoing to appellant and Clapes, then agreed to pay the losses and did so. The name "Wynn Don" did not again appear until a few days immediately before the meeting on January 2nd.

There is nothing in the record to support a finding that appellant, or, for that matter, his partner, Clapes, knew that Meyer had been placing bets, after the November occurrence, under the name "Wynn Don". For that matter, the proof demonstrates that appellant and his partner believed Meyers when he told them that "Wynn" had *actually placed the bets and had left town.* Obviously, appellant and his partners were angry at Meyer, not for using the name "Wynn" instead of his own, a fact of which they had no knowledge, but for permitting "Wynn" to make the bet and then leave town. What occurred at the crucial meeting speaks for itself. If appellant and his partners had known that Meyer was again using the name "Wynn Don", they would have confronted him with this fact and would not have been urgently inquiring as to the then whereabouts of the missing person. Beyond that, the record is quite clear that appellant, when he left the January 2nd meeting, was totally unaware of the fact that Meyer had again used the fictitious name. In agreeing to be responsible for the loss, Meyer was trying to keep appellant and his partners from learning of the fact that he had again made bets under the Wynn

name. Simply stated, the record is devoid of proof that appellant, or his partners, knew that Meyer had again been betting under the name "Wynn Don". The fact that Clapes may at one time have *"thought"* that "Wynn Don" and Meyer were *possibly* the same person does not rise to the dignity of proof against the appellant.

(2) Assuming, *arguendo,* that Meyer's statement that he would assume the debt and obtain the money from his parents amounts to an extension of credit as charged in the indictment, there is absolutely no evidence that appellant assaulted or, in any manner, abused Meyer after the assumption of the indebtedness. For that matter, the record would support a finding that appellant was protecting, rather than abusing Meyer.[1]

In *United States v. Quintana,* 457 F.2d 874 (CA10 1972), the extension of credit was undisputed. *Perez v. United States,* 402 U.S. 146 (1971), does not support a conviction on our facts.

In my view, the statutes in question were never intended to apply to a factual background such as that before us.

I would reverse and direct a dismissal of the indictment.

---

1. "Q And he [Clapes] grabbed him [Meyer], pulled him out of the chair?

A Yes, when he grabbed him it looked like James Clapes went back—I can't remember if Mr. Meyer hit him, pushed him or what the deal was, but then he started to hit him and then he grabbed him; they rolled to the floor, and he was trying to hit him on the floor *when Mr. Briola went over and broke up the fight."* [Witness, Ligrana, T. pp. 116-117]. [Emphasis supplied.]

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## ORDER DENYING REHEARING

SEPTEMBER TERM — SEPTEMBER 27, 1972

Before Honorable David T. Lewis, Chief Judge,
Honorable John F. Kilkenny, and Honorable William E. Doyle,
Circuit Judges

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>JOSEPH BRIOLA,<br>Defendant-Appellant. | Nos. 71-1615<br>72-1246<br>(Consolidated Cases) |

This matter comes on for consideration of the petition for rehearing filed by the appellant in the captioned consolidated cases.

Upon consideration whereof, it is,

ORDERED that the petition for rehearing be and is hereby denied; Judge Kilkenny, Circuit Judge, dissenting.

HOWARD K. PHILLIPS, Clerk

By: Anne Cabot
Deputy Clerk

A true copy

Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By Anne Cabot
Deputy Clerk

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-645

JOSEPH BRIOLA, PETITIONER

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

---

After a jury trial in the United States District Court for the District of Colorado petitioner was convicted of having attempted to collect an extension of credit by extortionate means, in violation of 18 U.S.C. 894(a). He was sentenced to eight years' imprisonment subject to the parole eligibility provisions of 18 U.S.C. 4208 (a)(2). The court of appeals affirmed with one judge dissenting (Pet. App. 1a-1h).

Petitioner alleges here that the evidence was insufficient to sustain a conviction under 18 U.S.C. 894; he claims that while the evidence may have established "the *creation* of an extension of credit by extortionate

means, * * * there is absolutely no evidence to indicate * * * [the] use [of] extortionate means to *collect* an extension of credit" (Pet. 5). Petitioner also claims that since the extortionate act—a physical beating—was administered by his partner in a bookmaking operation, he personally cannot be held responsible for it, even though the beating related to a "business" debt and petitioner was present during the assault. The opinion of the court of appeals thoroughly considered and properly rejected these contentions.[1] We rely on that opinion here in urging that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

DECEMBER 1972.

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[1] The cases cited by petitioner (Pet. 6) in support of his contention that he is not liable for criminal acts of his partner are inapposite. In both *United States* v. *Ward*, 168 F. 2d 226 (C.A. 3), and *United States* v. *Quinn*, 141 F. Supp. 622 (S.D.N.Y.), the courts did no more than recite and apply the proposition that "a partner is not chargeable with [criminal] acts of his co-partners unless he has knowledge" (141 F. Supp. at 627). Here, as the court of appeals held, petitioner "cannot escape responsibility for the beating which was inflicted by his partner Clapes in his presence since he was shown to have been standing by lending support to the activity of Clapes" (Pet. App. 1f). Petitioner's further claim that he could not be convicted, despite these facts, because the indictment charged him "specifically" with causing physical harm (Pet. 6), and not of aiding and abetting, is without merit. See *Theriault* v. *United States*, 401 F. 2d 79, 85 (C.A. 8), certiorari denied, 393 U.S. 1100, and cases cited; *United States* v. *Trollinger*, 415 F. 2d 527, 529, n. 4 (C.A. 5).

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## *AUTHORITIES CITED*


*Case:*

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2, C. A. Wright, Federal Practice and Procedure, Criminal § 557 at 525 ..... 2

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

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No. 72-645

---

JOSEPH BRIOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

---

On Petition for a Writ of Certiorari
To the United States
Court of Appeals for the Ninth Circuit

---

## PETITION FOR REHEARING

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Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on January 8, 1973, and (2) granting the petition. As grounds for this motion, petitioner states the following:

I. THE "LARRISON RULE," APPLIED IN FEDERAL CASES CONCERNING RECANTED TESTIMONY, DENIES PETITIONER DUE PROCESS OF LAW SINCE IT IS IMPOSSIBLE FOR AN INNOCENT DEFENDANT TO SATISFY THE THIRD REQUIREMENT OF THE RULE.

The Government's entire case against the petitioner was based

upon testimony of one witness, Donald Meyer. During the course of the trial, Meyer testified that the petitioner had slapped him and threatened to put him in a wheel chair. It was the slapping of Meyer by the petitioner that gave rise to the indictment charging petitioner with a violation of 18 U.S.C. § 894.

In November of 1971, Meyer went to the office of his trial attorney, and admitted that his testimony at the trial had not been true. He fully recanted his testimony, and admitted that the petitioner had never struck him nor made any threats to him. These admissions were the basis for petitioner's motion for a new trial. An evidentiary hearing was held before the District Court on February 10, 1972. Meyer testified under oath on both direct and cross-examination that he had been mistaken in his trial testimony, and that it was not the petitioner who had hit or threatened him. In reaching a determination, the District Court applied the standard which was first set forth in *Larrison v. United States,* 24 F.2d 82, 87-88 (7th Cir. 1928). This rule has been adopted by most federal jurisdictions, 74 A.L.R. 759, and the standard has been termed by legal writers as the "Larrison Rule," 2, C. A. Wright, Federal Practice and Procedure, Criminal, § 557, at 525. In *Larrison, supra,* the Court held that a new trial should be granted on the basis of recanted testimony when:

> "(a) The Court is reasonably well satisfied that the testimony given by a material witness is false.
>
> (b) That without it, the jury might have reached a different conclusion.
>
> (c) That the party seeking a new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know its falsity until after the trial." (emphasis supplied by the court.)

The District Court, in applying this standard, found that points a and c were not met. The Court did not believe Meyer's recanted testimony and found that the petitioner could not have been surprised by Meyer's testimony at trial, since Meyer's accusations

had been disbelieved by petitioner at the time of trial. This ruling was sustained by the Tenth Circuit Court of Appeals.

This application of the "Larrison Rule" denies a defendant, who is telling the truth and knows that the key witness against him is lying, the right to a new trial on the basis of recanted testimony, because there is no possible way for him to meet the third standard of the rule. If a defendant is in fact innocent and a witness for the Government commits perjury, there is no way a defendant can obtain a new trial on the basis of recanted testimony, since he cannot show surprise. As a consequence, the man who claims a witness is lying and proclaims his innocence is estopped from having a new trial granted in the basis of recanted testimony.

## *CONCLUSION*

For the foregoing reasons, as well as those contained in the petition for writ of certiorari, petitioner prays that the Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

JOHN J. FLYNN
1950 First National Bank Plaza
100 West Washington Street
Counsel for Petitioner

## *CERTIFICATE OF COUNSEL*

JOHN J. FLYNN, Counsel for the Petitioner, certifies to this Court that this Petition for Rehearing is presented in good faith, and not for delay.

Counsel further certifies that this Petition is restricted to a substantial ground which was available to the petitioner, but which was not previously presented to this Court.

John J. Flynn
Counsel for Petitioner